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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 662

CITIES SERVICE OIL COMPANY,
Petitioner,

against

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Supreme Court of the United States:

The petition of Cities Service Oil Company respectfully shows to the court as follows:

This suit was commenced by petition to the Court of Claims of the United States to recover the sum of $108,-718.70. The petitioner delivered diesel oil to the Navy Department in July 1947 and claimed the market value thereof on the ground that the oil was supplied on an open market basis. The respondent contended that a contract previously made between the parties entitled it to order oil at any time during 1 April 1947 through 30 June 1947, and to receive same in July 1947 at the contract price. The

petitioner claims that this contract did not entitle the respondent to any oil after 30 June 1947. By agreement of the parties the deliveries were made without prejudice to either contention, and the petitioner was paid the contract price by the Navy Department. The amount sued for is the difference between the market price and the amount so paid.

By decision dated December 5, 1950, the Court of Claims dismissed petitioner's original petition and on January 9, 1951, an order was entered in said court overruling petitioner's motion for a new trial.

Statement of Case

On February 18, 1947 the Navy Department issued a written request to petitioner and other oil companies for bids on the ". . . Navy Second Quarter 1947 requirement of diesel fuel oil . . ." to be ". . . delivered f.o.b. vessels at supplier's works during the period 1st April through 30th June, 1947." (Plaintiff's Exhibit 11). The petitioner's representative offered the respondent's representative a cargo per month of oil for April, May and June at a given price (Finding No. 2) and each made a written notation to this effect on his own copy of the Navy's aforementioned bid invitation. (Plaintiff's Exhibits 10 & 11).

The respondent telephoned petitioner's representative that its offer had been accepted and thereafter prepared and forwarded to petitioner a written contract (Defendant's Exhibit 1) which contained the following provisions:

"II Quantities

> The quantities above set forth are estimates only. The amounts which the Contractor may be required to furnish and the Government to accept hereunder, shall be the amounts which shall from time to time be ordered hereunder by the ordering officer during the

period of this contract. In any event, however, the Government shall order supplies hereunder having an aggregate value at the above unit price of not less than $100.00, and the Government shall be entitled to order and the Contractor shall be required to furnish supplies hereunder not in excess of the quantity designated for any item. If the Government orders and the Contractor, at its option, furnishes more than the foregoing maximum amount, the total quantity ordered and furnished shall be treated for all purposes as having been ordered and furnished under the terms of this contract and payment therefor shall be made at the applicable unit contract price or prices in effect on the date of delivery.

III Deliveries

The supplies to be furnished hereunder shall be delivered f.o.b. tankers and/or barges at Contractor's work, Lake Charles, Louisiana, in such quantities as may be ordered by the Government during the period beginning 1 April 1947 and ending 30 June 1947. Deliveries shall be made upon 3 days' notice."

After lifting the first cargo pursuant to the contract, the respondent nominated the Tanker "Fort Frederica" to lift another cargo of oil between June 17th and 19th, and on failing to effect such lifting, nominated the said vessel to lift the cargo on June 29th (Court's Finding No. 5), and on failing to effect this lifting nominated the vessel by telephone on July 7th and confirmed in writing on July 9th (Defendant's Exhibit 6) that the vessel would lift cargo on July 10th. The respondent failed to lift cargo pursuant to any of said nominations. (Court's Finding No. 5).

On June 11th the respondent placed a written order for the remaining cargo to be lifted by an unidentified vessel at an unstated date, and on June 18th nominated the Tanker "Fort Massaic" to lift this cargo on July 20th. On June

23rd respondent substituted the Tanker "Port Republic" for the "Fort Massaic" and advised that lifting would be on or about July 18th, and this telephone advice was confirmed in writing on July 3, 1947. The respondent failed to effect lifting on any of said dates (Court's Finding No. 5).

On July 10th or 11th petitioner's representative informed respondent's representative that by reason of the expiration of the contract on June 30th petitioner doubted that it would furnish further oil under the contract and on July 22nd petitioner by telephone and telegraph confirmed such statement and advised that any vessels thereafter presented by the Navy Department would be loaded at petitioner's posted price on the date vessel commenced to load (Court's Finding No. 6).

On July 23rd the parties hereto had a telephone conversation in which it was agreed that respondent's vessels would be loaded by petitioner without prejudice to petitioner's claim that the contract had expired and that petitioner was entitled to the market price as of the date of loading, or to respondent's contention that it was entitled to the contract price on the oil to be loaded. (Court's Finding No. 7).

On July 24th and 25th in the case of the "Fort Frederica", and on July 29th and 30th in the case of the "Port Republic", certain quantities of oil were loaded for which petitioner billed its posted price, which was equivalent to the current market price. Petitioner was paid the contract price by respondent, leaving unpaid the sum of $108,718.70 which is the amount sued for. (Court's Finding No. 8).

The hearing commissioner and the court found that paragraph 3 of the contract was ambiguous and was susceptible of construction either, as contended by petitioner, that deliveries were to be effected during the period beginning 1 April 1947 and ending 30 June 1947 or, as contended by

respondent, that deliveries were to be as ordered by the Government in the period 1 April 1947 and ending 30 June 1947 (Tr. pp. 394, 395; Court's Opinion). The petitioner's proof to resolve the ambiguity consisted of respondent's original invitation for bid (Plaintiff's Exhibit 11), the testimony of and notations made by the negotiators for the parties in connection with petitioner's offer of one cargo per month (Plaintiff's Exhibits 10 & 11), and a sequence of "deliveries" clauses in prior contract schedules and invitations for bids of the Navy Department in which by punctuation it was clear that the specified dates referred to the period of delivery, and not the period of order (Pltff's Exs. 12-24, 33, 45, 46, 49-56, 58, 59, 60, 62, 63, 64, 66, 67), and a series of exhibits which showed that in prior dealings between the petitioner and in dealings with other Government departments the respondent had construed identical delivery clauses as requiring deliveries, and not orders alone, to be effected within the period of time specified in each clause.

Plaintiff's Exhibit 40 (to be read with Plaintiff's Exhibit 40A);
Plaintiff's Exhibit 68 (compare delivery clause with Plaintiff's Exhibits 66 and 67);
Plaintiff's Exhibit 41 (to be read with Plaintiff's Exhibit 41A);
Plaintiff's Exhibit 32 (to be read with Plaintiff's Exhibit 33);
Plaintiff's Exhibit 48 ("Deliveries" provision to be read with Navy's Acceptance of Tender included with Exhibit);
Plaintiff's Exhibit 72 (compare "Deliveries" clause with tender acceptance (first sheet of Plaintiff's Exhibit 72) and Plaintiff's Exhibits 70 and 71);
Tr. pp. 627-628, Q. & A. 172 and 173, to be compared with Plaintiff's Exhibit 73;
Tr. p. 632. Q. & A. 178, to be compared with Plaintiff's Exhibit 78.

The respondent's only proof in rebuttal of the foregoing was conclusory testimony of two witnesses that there was a custom to make deliveries after the stated period, (Tr. pp. 458, 473, 296) which was objected to by petitioner (Tr. pp. 295, 296, 458, 461, 473); and a schedule of relatively few deliveries made at interrupted intervals over a short period of years offered to show the alleged custom (Defendant's Exhibit 23); which deliveries, in fact, were made under contracts which in clear terms called for delivery within an express period; and further proof that in certain few instances, all of which but one, were within the period of OPA price control, the petitioner on other contracts made delivery to the respondent after the expiration of the contract period. (Tr. pp. 480-485, 572).

The Record Presents the Following Questions:

1. May proof of custom be considered in a case where the ambiguity in a contract provision is resolved by clear proof of the contemporaneous actual intention of the parties?

The court below found the "deliveries" clause of the contract to be ambiguous and then resolved the ambiguity in respondent's favor on the basis of imputed intention of the parties by reason of an alleged custom whereby suppliers of petroleum to the Navy Department would furnish products at the contract price after the expiration of the contract period, when orders were placed within such period. The findings of the court below in respect of the Navy Department bid invitation and the negotiations on which the contract was based should necessarily have resulted in the court's resolution of the ambiguity to the effect urged by petitioner, without regard to, or consideration of, alleged custom. This court, in *Barnard* v. *Kellogg*, 10 Wall. 383, 390, has held that proof of a custom or practice is not

competent to resolve an ambiguity where the parties' actual intention can be ascertained from accompanying circumstances, and this rule is followed by the New York Court of Appeals in *Union Trust Co. of N. Y.* v. *Whiton*, 97 N. Y. 172, and in the Restatement of the Law of Contracts at Vol. 1, Sec. 247, p. 350.

2. Can a custom or usage be established by evidence in conclusory form which does not relate to the particular facts or circumstances of the alleged custom or the duration or universality thereof?

In finding the "custom" referred to in its opinion, the court below violated the rules laid down in *Federal Reserve Bank* v. *Molloy*, 264 U. S. 160; *In re Bowling Green Milling Co.*, 132 F. (2d) 279 (C. C. A. 6th); *Sickel Co.* v. *Union Pac. R. Co.*, 111 F. (2d) 746 (C. C. A. 9th); *American Guaranty Co.* v. *American Fidelity Co.*, 260 Fed. 897, 899 (C. C. A. 6th); Wigmore on Evidence, Vol. 2, Par. 379 (p. 316); which clearly hold that before a "custom" can be said to be established by the evidence it must be clearly defined, certain and universal in character of long duration and continuous in occurrence under conditions substantially similar on each occasion.

3. After the respondent has ordered a fixed quantity of oil for delivery aboard a designated vessel, on a specified date, pursuant to a procurement contract with a supplier according respondent the right to place such orders within a stated period, does the order thus placed survive the respondent's failure to lift the cargo on the appointed day, so as to entitle the respondent, after the expiration of the ordering period, to demand delivery at a later date?

In dealing with delivery provisions of mercantile contracts, this court has often held that time is of the essence of the contract. *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 261; *Norrington* v. *Wright*, 115 U. S. 188, 203; *Jones* v.

U. S., 96 U. S. 24. This rule discloses manifest error in the holding of the court below that respondent could properly demand a subsequent delivery of oil at the contract price after the expiration of the ordering period despite its previous defaults in taking cargo on the several delivery dates through July 20th which it had specified.

4. Did petitioner's failure to object to respondent's orders for lifting of cargo on July 10th and July 20th, 1947 (which orders were not, in fact, lifted by respondent on said dates) estop petitioner from refusing to deliver oil at the contract price on orders placed after the expiration of the contract ordering period?

If it be assumed that petitioner's failure to object to respondent's orders for lifting of cargo on July 10th and July 18th represented a waiver of any rights which petitioner may have had to reject such orders as untimely under the contract, such lack of objection represented no waiver or estoppel in respect of respondent's efforts to obtain delivery after petitioner on July 22nd had declared its intention, by reason of the contract's expiration, to furnish no further oil at the contract price. A finding of estoppel such as is implied in the opinion below, can be predicated only upon a showing of detriment or change of position by the party claiming same. *Jones* v. *U. S.*, 96 U. S. 24, and *Railroad Co.* v. *Dubois*, 12 Wall. 47, 64. The record herein is utterly lacking in any proof showing that the petitioner's acceptance of the orders for July 10th and July 18th resulted in any prejudice or change of position on respondent's part. If anything, the prejudice and change of position would have been on the part of petitioner, which would have been required by said orders to procure the oil necessary to fill such orders.

Reasons for Granting the Writ

1. In essence, it is the position of the petitioner that the construction of the contract provision which is urged by the respondent is an afterthought and a perversion of the true intention of the parties. The government sent the petitioner an invitation to bid which in direct and literal language stated that the oil was to be delivered in the period April 1, 1947 through June 30, 1947. The government prepared and submitted to the petitioner a contract containing a "deliveries" provision which to the unsuspecting petitioner incorporated the substance and intention of the bid invitation and negotiations. Thereafter, the government applied a subtle construction to the language of the "deliveries" clause whereunder it sought to claim the delivery of oil after the expiration of the contract period. This court has stated in the case of *U. S.* v. *Purcell Envelope Co.* 249 U. S. 318:

> "And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own."

It is submitted that it is of outstanding and salutary importance that the government be stayed when it urges a sharp and oppressive position which would not pass scrutiny even under the code of morality of the market place.

2. If we disregard the petitioner's clear proof which resolved the ambiguity of the deliveries clause, such clause on its face is susceptible of either of two constructions. One construction would be the petitioner's proposition that the oil was to be delivered in the specified period 1 April 1947 through 30 June 1947 and the other construction would be the respondent's proposition that the oil was to be delivered at any time provided that it was ordered in the stated period 1 April through 30 June 1947. An analysis of

the two possible constructions discloses that the petitioner's construction is reasonable, consistent with trade practice, (Wellemeyer Q. 198), and free of possibility of controversy or litigation. An analysis of the respondent's construction shows that it is implicit with the litigation possibility, since neither party would be aware of the time when their respective obligation and right to deliver and receive the oil expires; it is unreasonable in placing the vendor at the mercy of the government, since the vendor would not know when it would be relieved of the supply obligation; and it is inconsistent with normal industry practice which requires precision in respect of the delivery period in order to permit the seller to schedule production or procurement of the goods (Wellemeyer, Q. 198-201; Bruggeman, Tr. 514, 517).

It is urged that it is outstandingly important to the business community and in government procurement activities to have a ruling in this case on the question of whether or not under ambiguous or controversial circumstances the government's rights and claims are to be evaluated consistently with established business procedure and rules of reasonable construction.

3. The decision in the instant case is in conflict with established law. There has been disregard of the fundamental proposition that an ambiguity should generally be resolved against the draftsman, and of the equally well established proposition that an ambiguity should be resolved by proof of the party's actual intention, which is virtually conceded by the statement in the court's opinion that "taken literally, the invitation for bid supports the plaintiff's argument that the contract was to apply only to oil delivered during the three month period named in the contract, while the notification of award and the formal contract support the government's argument." The notification of award and formal contract represent the very

ambiguities which were before the court for determination, and self-evidently, as the very matters in question, could not shed light on the intention of the parties.

It is urged that it is important that there be a clarification of the criteria for ascertaining intention and for clarifying ambiguities, particularly when, as in this case, a contract with the government and prepared by the government is in issue.

Wherefore, petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above entitled case on December 5, 1950 and the order of said court overruling plaintiff's motion for a new trial entered in the above entitled case on January 9, 1951.

GEORGE H. COLIN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

CITIES SERVICE OIL COMPANY,
Petitioner,

against

THE UNITED STATES,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court of Claims has not been officially reported.

Statement as to Jurisdiction

The jurisdiction of this court is invoked pursuant to 28 U. S. C. A. section 1255.

Statement as to Facts

The facts herein have been fully set forth in the annexed petition.

Specification of Errors

The Court of Claims erred in holding that:

1. Proof of custom may be considered in the case where the ambiguity in a contract provision is resolved by clear proof of the contemporaneous actual intention of the parties.

2. A custom or usage can be established by evidence in conclusory form which does not relate to the particular facts or circumstances of the alleged custom or the duration or universality thereof.

3. After the respondent has ordered a fixed quantity of oil for delivery aboard a designated vessel, on a specified date, pursuant to a procurement contract with a supplier according respondent the right to place such orders within a stated period, the order thus placed survives the respondent's failure to lift the cargo on the appointed day, so as to entitle the respondent, after the expiration of the ordering period, to demand delivery at a later date.

4. Petitioner's failure to object to respondent's orders for lifting of cargo on July 10th and July 20th, 1947 (which orders were not, in fact, lifted by respondent on said dates) estopped petitioner from refusing to deliver oil at the contract price on orders placed after the expiration of the contract ordering period.

Point I

Where a Contract Ambiguity Is Explained by Clear, Undisputed Proof of the Actual Intention of the Parties, Proof of a Custom at Variance With the Contract as Thus Explained Cannot Be Considered.

The court below found the "deliveries" clause of the contract to be ambiguous and then resolved the ambiguity by finding what it stated to be a binding custom whereby suppliers of petroleum to the Navy would furnish product subsequent to the expiration of the period expressed in the "deliveries" clause, provided that orders therefor were placed within such period. It is well settled law that in the resolution of ambiguities the court should seek to determine what was actually within the mind and contemplation of the parties at the time they negotiated the agreement which is

imperfectly expressed by the ambiguous provision. If such actual intention can be ascertained, then necessarily the court must find such intention to be the meaning of the ambiguous phrase, and even if there actually exists a custom or practice which is at variance with such indicated intention, proof thereof is not competent to establish or resolve the ambiguity, which is already resolved by the proof of the parties' actual intention. In 25 C.J.S. 120 (Sec. 30), the rule is clearly stated as follows:

> "Even where a contract is indistinct and uncertain in its terms it cannot be contradicted by usage, and, although the contract is ambiguous on its face, if the intent of the parties to exclude the usage is shown by parol, proof of usage cannot be admitted to vary the contract as so explained."

This rule was applied in the case of *Union Trust Co. of N. Y.* v. *Whiton*, 97 N. Y. 172, where the New York Court of Appeals held (p. 180):

> "The existence of a custom cannot overrule the terms of a contract ambiguous on its face, and the explanation given by parol evidence showing what was really intended by the parties."

In *Barnard* v. *Kellogg*, 10 Wall. 383, 390, this court said:

> "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract whether written or in parol *which could not be done without the aid of this extrinsic evidence.* (emphasis supplied).

A further enunciation of this rule is found in Restatement of the Law of Contracts, Vol. 1, Sec. 247, p. 350, under Comment "d":

> "Therefore, if the words of their agreement *read in the light of accompanying circumstances* warrant the

> conclusion that they did not contract with reference to the usage, it is not applicable. The question is whether upon the interpretation of the whole contract, enough appears, *either from specific words or from the words and other facts,* to show that the parties did not intend the meaning indicated by the usage to prevail." (emphasis supplied.)

Proof of such custom or practice would be competent only if there were lacking in evidence clear proof of the actual intention of the parties, in which case proof of such custom or practice is accepted as proof of an imputed intention not otherwise revealed by proof of actual intention at the time of negotiation.

In the record of this case there is clear and undisputed proof of the actual intention of the parties. The defendant itself prepared the bid invitation in which it clearly stated the terms on which it sought invitations for the supply of diesel oil. The invitation, as found by the court, in literal terms provided that the delivery of the oil was to be accomplished in the months of April, May and June. The negotiators for the parties, Messrs. Bruggeman and Collins, agreed in their testimony that their discussions involved one cargo per month,—obviously referring to the months of April, May and June expressed in the bid invitation. By peculiar and conclusive coincidence, each of the negotiators had noted the substance of their telephone conversation in almost identical terms on their respective copies of the bid invitation (Pltff's Exs. 10, 11). The record contains numerous exhibits by way of formal bid invitation schedules and informal solicitations for bids which had been forwarded by the defendant to the plaintiff over a substantial period of the time prior to the execution of the contract involved in this case, in each of which there was contained a "deliveries" clause written and punctuated in language which communicated unmistakably to the plaintiff the de-

fendant's intention and understanding that deliveries were to be concluded within the period expressed in the "deliveries" clause (Pltff's Exs. 12-24, 33, 45, 46, 49-56, 58, 59, 60, 62, 63, 64, 66, 67). It was testified by the defendant's chief procurement officer, Commander Drescher, that it was the defendant's intention that the "deliveries" provision of the contract express the negotiations between the parties (Tr. pp. 305-306, 390-391), which negotiations must necessarily comprehend the defendant's own bid invitation, the clear expression of the negotiators that the deliveries were to be made within the specified months, and the undisputable awareness obtained by the plaintiff from the defendant's own prior bid invitation schedules that petroleum deliveries were to be effected within the calendar period expressed in the "deliveries" clause. These items of proof, all of which bear on the actual intention of the parties in respect of the ambiguous "deliveries" clause, stand uncontradicted, and it is contended by the plaintiff herein that the court erred in even admitting or construing proof of delivery practices under Navy contracts when the record is so clear in resolving the true intention of the parties in respect of the ambiguous clause.

Point II

The Evidence in This Case Fails as a Matter of Law to Establish a Binding Custom

It is further contended by the plaintiff that even if consideration could properly, as a matter of law, be given to proof of customs or usage in making deliveries under contracts with the Navy Department, nevertheless the record herein contained no proof which in weight, sufficiency, or quality even begins to approach the weight and conclusiveness of plaintiff's aforementioned uncontradicted evidence. The law in respect of customs is well settled. A custom or

usage exists only in respect of practices which are consistent and continuous in occurrence, certain and universal in character, of long duration, and which occur under conditions substantially similar to those in question. 55 Am. Jur., 266 et seq. Secs. 4 et seq. *American Guaranty Co.* v. *American Fidelity Co.*, 260 Fed. 897, 899 (C. C. A. 6th).

In Wigmore on Evidence, Vol. 2, Par. 379 (p. 316), it is stated:

> "In evidencing a custom or usage * * * the instances offered (a) should be sufficiently numerous to indicate a fairly regular course of business, and (b) should occur under conditions substantially similar to that in question. * * * Under the second head, it is obvious that there must be such a similarity or unity of conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons under similar circumstances."

A case often cited on the elements of certainty and uniformity essential to make a custom operative, is that of *Federal Reserve Bank* v. *Molloy*, 264 U. S. 160. There, this Court held (p. 170):

> "But the proof shows that the alleged custom was not known to plaintiffs; and they could not be held to it without such knowledge, because, all other reasons aside, by its uncertainty and lack of uniformity, it furnishes no definite standard by which the terms of the implied consent sought to be established thereby, can be determined. * * * A custom to do a thing in either one or the other of two modes, as the person relying upon it may choose, can furnish no basis for an implication that the person sought to be bound by it had in mind one mode rather than the other."

In the case of *In re Bowling Green Milling Co.*, 132 F. (2d) 279 (C. C. A. 6th), the court said:

> "A usage to be availed of must be well established, uniform, certain, fixed in character and commonly known. * * * It is not sufficient that an act is frequently done, since a loose, variable custom or discretionary practice will not be permitted to control the right of the parties to a contract."

And in *Sickel Co.* v. *Union Pac. R. Co.*, 111 F. (2d) 746 (C. C. A. 9th), it was held:

> "* * * a loose and variable practice or alleged usage which leaves some material element to individual's discretion will not control."

It is clear from the Court's Finding #10 that the court gave credence to testimony of defendant's witness Custer in respect of deliveries made subsequent to the stated period, although such testimony was entirely conclusory in form, unrelated to any particular contract provisions or to any proof that the contracts contained provisions analogous to those involved in this case (Tr. pp. 458, 473). The testimony of Commander Drescher along these lines (Tr. p. 296) was also conclusory and of no legal weight or validity by reason of the same infirmities which attach to Mr. Custer's testimony. Apart from the legally insufficient testimony of these two witnesses, which was objected to by plaintiff's attorney (Tr. pp. 295-296, 458-461, 473), the only other record proof of late deliveries consists of Defendant's Exhibit 23 in which each and every late delivery urged by the defendant was accomplished under a contract "deliveries" clause which provided in clear and unequivocal terms that delivery was to be made within a stated period, and in which late deliveries, if they were made, could not prove a custom or usage, but could only represent a waiver by one contracting party of a clear provision of the contract.

The character of the late deliveries under Defendant's Exhibit 23 as waivers of clear contract rights, rather than

proof of custom, is attested by the statement of this Court in the case of *Moore* v. *United States,* 196 U. S. 157 (p. 166):

> "It (custom) may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but *not to vary or contradict the terms of a contract.*" (Emphasis supplied.)

And in the statement in 55 Am. Jur. 291, Sec. 31:

> "Perhaps the most fundamental of the rules which limit the introduction of a custom or usage to affect the rights of parties to a written contract is that which denies the admissibility of such evidence where its purpose or effect is to contradict the plain, unambiguous terms, covenants, and agreements expressed in the contract itself, * * * "

The sole additional item of proof in respect to deliveries outside the stated contract period was proof that in only a single isolated instance while OPA price control was not applicable, did the plaintiff herein make a delivery under a prior contract after the expiration of the contract period. The defendant's proof of other late deliveries by the plaintiff to it in some six or seven other instances involved contracts performed during the period of OPA price control, when, by reason of such government regulation, the price which could be realized for the oil after the expiration of the contract period would have been identical with the price within the contract period, with the consequence that it was immaterial whether such period had expired (Wellemeyer, Tr. p. 572). Entirely apart from the absence in the record of proof of any late deliveries, but one, which might be adverted to as supporting such a custom, is the circumstance that there is no proof that any such custom endured for a sufficiently long period of time to charge plaintiff with imputed knowledge thereof, bearing in mind in this connection that there is no proof whatsoever in the record of any actual knowledge of such a custom on plaintiff's part.

Even if any weight be given to defendant's wholly immaterial Exhibit 23 which related to contracts containing specified delivery dates, it will be observed that the exhibit covers a number of contracts made in 1941 and 1942 (almost all within OPA price control period) and a number of contracts made in 1947, some of which are subsequent in date to the contract involved herein. There is no proof whatsoever as to practice in the intervening years of 1943 through 1946 inclusive or in the years prior to 1941, and it would therefore follow that by such failure of proof of continuity and long duration, if for no other reason, a custom could not, in law, be established. Measured against the legal criteria of continuity, certainty, universality, long duration and occurrence under conditions substantially similar to those in question, the defendant's proof of custom and usage fails on every count. Its proof of custom is limited to a small number of contracts in the years 1941 and 1942 and another group of contracts in 1947. Obviously, such proof does not show continuity. The defendant's proof of custom is lacking in certainty since it does not define a precise and fixed period of delay which is claimed to be covered by the custom, but relates only to an uncertain period and is therefore lacking in a definite standard for measurement of the custom, which is stated to be requisite by the case of *Federal Reserve Bank* v. *Molloy, supra.* So far as universality is concerned, the custom is claimed to be peculiar only to one purchaser of petroleum products, the Navy Department, and the proof is uncontroverted that the industry at large does business on contracts which expressly specify the time in which delivery is to be made (Wellemeyer, Tr. p. 570; Bruggeman, Tr. p. 497). The lack of competent proof to show a usage of long duration is manifest,—since the proof at best commences in 1941, and lapses as to the years 1943-1944-1945 and 1946.

There is virtually no proof whatsoever of the occurrence of the custom under conditions substantially similar to those in issue, as the late deliveries put forward by the defendant in its Exhibit 23 relate to agreements which called for delivery within a fixed period, and the defendant has shown only one other instance of late delivery which applies to a contract similar to the one here in issue. A more complete failure of proof under the clear legal criteria could not readily be found.

As against the defendant's legally inadequate and quantitatively minimal proof in respect of custom, we have several uncontradicted instances in which the defendant expressed in writing its understanding that a "deliveries" clause such as is involved in this case carried the meaning that deliveries were to be accomplished within the stated contract period (Pltff.'s Exs. 40 and 40a, 41 and 41a, 48, 70, 71, 73, 32 and 33). Apart from these specified instances which occurred in dealings involving the plaintiff, there is the proof that, without exception, in the preparation of its inter-department "notice of award" form which the Navy Department transmitted to the Department of Labor, it characterized "deliveries" clauses such as are here involved as meaning that the deliveries were to be accomplished within the stated contract period (Pltff.'s Ex. 78 to be read with delivery prov. at Tr. 632; Pltff.'s Ex. 71 to be read with Pltff's Ex. 72; Pltff's Ex. 66 to be read with Pltff's Ex. 68). In addition there was the uncontroverted testimony of Messrs. Wellemeyer and Bruggeman that there was no practice or usage in the oil industry to write contracts with "delivery" provisions as contended by the defendant, but rather, that the industry practice was to the effect urged by plaintiff (Wellemeyer Tr. p. 570, Bruggeman Tr. p. 497). Furthermore, these witnesses explained why it was unreasonable and impracticable to have delivery

clauses to the effect urged by the Navy (Wellemeyer Tr. p. 571, Bruggeman Tr. pp. 514-519).

It is respectfully submitted, as demonstrated in Point I of this brief, that the plaintiff's proof of the parties' actual intention and understanding at the time of contract negotiations is clear in resolving the ambiguity to the effect urged by the plaintiff, and that the court should not have received or considered proof of the delivery custom or practice in the face of the clear proof of the parties' actual intention. It is further respectfully submitted that analysis of the defendant's proof of the so-called custom shows that the defendant failed, as a matter of law, to establish the existence of a custom or usage which was entitled to consideration in the resolution of the ambiguity, and that even if defendant's offer of such proof be deemed legally admissible, it is so heavily outweighed by the mass and quality of plaintiff's proof as to make the court's findings on this point contrary to the evidence and the weight thereof.

Point III

The Lower Court's Finding and Judgment that the Oil Delivered on July 25th and July 29th Was Ordered in June, and Pursuant to the Contract, Is Contrary to the Law and the Evidence.

It has been found as a fact that the defendant in June ordered a cargo of oil to be lifted by the "Fort Frederica" on or about June 29th (Finding #5), and that on July 7th by a telephone conversation (confirmed by letter received by plaintiff on July 23rd), the defendant postponed the loading of the "Fort Frederica" to July 10, 1947. The court also found that on June 23rd the defendant advised plaintiff of its order to lift a cargo of oil on or about July 18th by the tanker "Port Republic". It is equally clear from the court's Finding #5 that the defendant defaulted

in effecting the liftings which it had ordered for July 10th and July 18th.

The contract herein was indefinite as to quantity and date of delivery, and accorded the defendant the right to fill in these conditions by placing orders which specified quantity and date of delivery. It follows, therefore, that when the defendant placed a delivery order with plaintiff for a specified quantity of oil to be delivered on a specified date, it transformed the contract from one providing an indefinite quantity and indefinite date of delivery to one which was just as definite as to quantity and delivery date as a contract which in its original provisions covered these conditions in express terms. As stated in *Norrington* v. *Wright*, 115 U. S. 188, 212:

> "* * * the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, *and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels.* (Citing cases.)" (Emphasis supplied.)

There can be no question that in the case of a contract which by its express terms, or by exercise of the buyer's right to specify delivery date and quantity, provides for lifting of a specified quantity of goods on a specified date, there is a breach of contract should either party fail in its obligation either to deliver or accept the goods. As stated by this Court in *Jones* v. *U. S.*, 96 U. S. 24:

> "Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser; and the rule in such a case is, that the purchaser is not bound to accept and pay for the goods, unless the same are delivered or tendered on the day specified in the con-

tract. Addison, Contr. 185; *Gath* v. *Lees*, 3 H. & C. 558; *Coddington* v. *Paleologo*, Law Rep. 2 Exch. 196."

To the same effect, see *Norrington* v. *Wright*, 115 U. S. 188, 203; and *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 261. The case of *Johnson* v. *Allen*, 78 Ala. 387, 56 Am. Rep. 34, involved facts similar to those of the instant case. In that case, as in this one, the purchaser had the right under the contract to specify the quantity to be shipped and the time of delivery. The Court said in this connection:

> "When the plaintiffs ordered the delivery of 200 tons in each of the months of September, October and November, they fixed the periods and quantities of delivery, and exhausted their right to order. To allow a vendee, who has the right to determine the times and quantities of delivery, the right to change at pleasure his orders when once made, may result in putting the vendor to great disadvantage and injury, and place him in a situation where a breach of his contract may necessarily occur. The presumption should be, that a vendor intending in good faith to fulfill his contracts, will arrange to meet the orders of his vendee, having been once given, as well as his engagements with others."

In *Blossom* v. *Shotter*, 59 Hun. 481 (aff'd without opinion 128 N. Y. 679), plaintiff wrote defendants, under date of February 23rd, that his vessel would report at Savannah "within the next thirty to forty days" for the purpose of lifting rosin purchased by him from defendants. The court noted that although the forty day period expired on April 4th, no vessel arrived at Savannah before April 10th. Accordingly, it was held that plaintiff was not entitled to recover for non-delivery of the rosin since (p. 486):

> "• • • the defendants owed no obligation to the plaintiff except to wait for the expiration of the time, and after the time expired in which the plaintiff agreed

> to have his vessel there, they were absolved from completion of the contract."

See also, *Percy Kent Co.* v. *Silberstein,* 241 N. Y. 440 and Uniform Sales Act, Sec. 64. Thus, when the defendant ordered oil for lifting on July 10th and July 18th it bound itself in law to accept the oil on said dates, and when it defaulted in lifting the oil, it exposed itself to plaintiff's properly exercised right, as communicated by plaintiff on July 22nd and July 23rd, to decline further deliveries at the contract price. Uniform Sales Act, Sec. 65. This applies whether, as contended by defendant, the defendant was entitled to order oil in June for delivery in July, and actually placed proper and timely orders under this contract construction; or whether the defendant was limited to June 30th in the receipt of oil, and had its time extended by plaintiff's waiver to July 10th and July 18th. Even if it be held that the plaintiff had waived its right to limit deliveries to June 30th, nevertheless such waiver did not extend beyond acceptance of the defendant's orders for July 10th and July 18th lifting, and the defendant's default in lifting on said dates extinguished any rights the defendant might have obtained from such waiver. *Duluth Superior Milling Co.* v. *Binenstock,* 106 Pa. Super. 322.

It is clear on the face of the record of this case that at the time notification was given by the plaintiff to the defendant of intention not to supply further oil under the contract the defendant was a defaulting buyer under the last orders which it had placed and, equally important, had placed no further orders with the plaintiff, nor sought further postponement of lifting, nor been granted further extension or waiver by plaintiff. The record shows that it was only in the course of the telephone conversation of July 23rd, in which plaintiff expressed its decision to supply no further oil, that the defendant sought the deliveries

which were ultimately made on July 25th and July 29th, and which form the basis of plaintiff's claim herein. (Court's Finding #5-7). It is equally clear from the record that between the times when the defendant placed its orders for the unfulfilled liftings of July 10th and July 18th, and the time when, on July 23rd, the defendant requested the deliveries which were thereafter made without prejudice, the market price of the oil advanced substantially.

It is contended by plaintiff that the defendant's rights were extinguished and terminated by its default in lifting on July 10th and July 18th, and that life and vitality could not be breathed into the defaulted contract under which the ordering period had, moreover, expired. It is further urged, that under such circumstances the oil which was delivered in the instant case was ordered, as a matter of law, in the telephone conversation of July 23, 1947, with the corresponding obligation to pay the prevailing market price therefor, since the contract at that time had no further life or effect.

Point IV

The Lower Court Erred in Holding the Plaintiff to Be Estopped from Refusing Further Deliveries under the Contract.

In the lower court's opinion, on page 12, the Court infers an estoppel against the plaintiff by adverting to an asserted failure on plaintiff's part to give notice to the defendant of plaintiff's contention that the defendant was entitled to no further deliveries under the contract. Assuming this language of the opinion to be tantamount to a finding of an estoppel, it becomes necessary to examine the record to ascertain whether the well established legal elements of estoppel are present. As stated in 19 Am. Jur. 634 Secs. 34

et seq.—and as universally understood, estoppel involves doing or not doing something with the effect and result that another party, properly entitled to rely on the act or omission, is caused thereby to take or refrain from action to his ensuing detriment.

In the instant case, the plaintiff gave notice to the defendant on July 11th, and on July 22nd and 23rd, of its intention to furnish no further oil under the contract. If the notice given by Mr. Bruggeman on July 11th be held not to be definite and positive, nevertheless the statement of plaintiff's position given on July 22nd and 23rd is clear and unequivocal. It follows, therefore, that no estoppel can be spelled out by reason of plaintiff's silence or failure to state its position from and after July 22nd or 23rd, and that any estoppel found by the court must be related to plaintiff's failure to give notice before such dates. If the record is analyzed, however, as was done in the preceding point of this brief, it will be seen that there was no detriment whatsoever caused to the defendant by plaintiff's failure to state its position prior to July 22nd, since the defendant's only orders placed prior to said date were accepted by plaintiff and were defaulted upon by the defendant's own failure to lift cargo on July 10th and July 18th. If it be assumed that as to the orders placed for these dates the plaintiff was estopped, by reason of its failure to unequivocally reject same, from refusing to fill them, nevertheless, such estoppel expired in law as a result of the defendant's own failure to lift these cargoes, and it cannot be urged in respect of any later dealing. As stated in 19 Am. Jur. 680, Sec. 62, "Acquiescence in the past does not necessarily estop a party from changing his course of conduct as to the future especially where there has been a change in conditions." The "change in conditions" adverted to by this authority is, of course, the further increases in the market price of the oil

on June 16th and on July 10th. (Court's Finding #9). The court's inference, on page 12 of its opinion, that plaintiff's failure to reject the orders for July 10th and July 18th caused detriment to the defendant is without support in the law or the evidence. Whether it be the fact that plaintiff's failure to reject these orders was a waiver in contemplation of law, or an estoppel, in either event no detriment to the defendant resulted therefrom, since the proof is uncontroverted that the defendant itself defaulted in lifting on those dates.

The order which resulted in the deliveries of July 25th and July 29th on which plaintiff's claim is based was placed only on July 23rd in the course of the telephone conversation in which plaintiff had very clearly stated its position and intention not to deliver further oil at the contract price. At that time the defendant had no further rights under the contract; such rights as it enjoyed by the contract, or by waiver or by estoppel having been lost by time and by its own default. Before defendant tried to order the additional oil which was ultimately delivered,—in fact, before defendant is shown by the record to have done anything further after its default, defendant was clearly informed of plaintiff's position. Thus, it is manifest that as to the deliveries made on July 25th and July 29th there are lacking for a finding of estoppel the prerequisite of failure to speak on plaintiff's part, and the further legal requisite of detriment or damage to the defendant as a result thereof. *Jones* v. *U. S., supra,* p. 29; *Railroad Co.* v. *Dubois,* 12 Wall. 47, 64. It is respectfully submitted that the court's determination can in no manner be predicated upon any estoppel against the plaintiff.

Point V

Reasons for Granting the Writ

It is respectfully urged that because of the errors hereinabove adverted to, the court below erroneously decided this case and that sufficient reasons are present for the granting of a writ of certiorari.

a. It is of salutary importance to the business community and to government procurement activities that this Court rule on the question herein of whether or not, under ambiguous circumstances, the Government's rights are to be determined consistently with established business procedure and rules of reasonable construction.

It has been shown under Point I that the ambiguity of the "deliveries" clause is resolved by clear and undisputed proof of the actual intention of the parties as disclosed by the bid invitation and the negotiations leading up to the contract. Assuming, arguendo, that such clear proof were absent here, the clause in question would be susceptible of one of two constructions. One construction would be, as contended by petitioner, that the oil was to be delivered in the specified period April 1, 1947 through June 30, 1947. This construction is reasonable, consistent with trade practice and free of controversial effect. The other construction would be, as claimed by the Government, that the specified period April 1st through June 30th, 1947 governs the time of ordering only, with deliveries to be made at any time requested by the Government, either during or after the expiration of the stated period. The undesirable implications of the Government's construction are readily apparent since the lack of a definite expiration date with respect to the obligation and right of the respective parties to deliver and receive the oil, would likely result in controversy or litigation. Moreover, it would be unreasonable to

place the seller in the precarious position of not knowing when it would be relieved of its supply obligation and entirely at the mercy of the Government which, enjoying a fixed price under the contract, could by its construction of the contract, call on the seller for goods at a long deferred date after a substantial increase in the market price of the oil. Furthermore, the latter construction would be inconsistent with normal industry practice which requires precision with respect to the delivery period in order to permit the seller to schedule production or procurement of the goods (Wellemeyer, Tr. 570-571; Bruggeman, Tr. 514-517). These inequities and hardships imposed upon a seller by the Government's construction become aggravated if the Government may as it claims it had the right to do in this case, designate delivery dates for its lifting of goods and then postpone the delivery dates thus fixed, regardless of the seller's preparations and scheduling of production or procurement.

b. Respondent's construction of the contract provision is an afterthought and a perversion of the true intention of the parties, which should not be condoned.

The Government's invitation to bid, in clear and unmistakable language, requested petitioner to submit a bid proposal for the delivery of oil during the period April 1, 1947 through June 30, 1947. After petitioner was notified that it had been awarded the contract, the Government undertook to, and actually did, prepare and submit to petitioner a contract with a "deliveries" provision which appeared to the unsuspecting petitioner to incorporate the intention of the bid invitation and negotiations. Now, the Government is applying a subtle twist of language by which it seeks to claim the delivery of oil after the expiration of the period specified in the "deliveries" clause. This distorted construction is contrary to the true intention of the parties

and violates the tenet of business morality which is given expression in the case of *U. S.* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, where this court said:

> "And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own."

It is submitted, therefore, that as a matter of justice in this case and as an assurance of fair play in government procurement activities generally, the defendant should be stayed when it engages in shrewd and sharp practices with its bidders.

c. The decision of the court below is in conflict with well-settled principles of law.

The decision herein has disregarded the fundamental proposition that where, as here, an ambiguity can be resolved by proof of the actual intention of the parties, proof of custom or imputed intention to the contrary cannot be considered (Point I, supra) and that, in any event, in order to be binding as a custom, a practice must be shown to be consistent and continuous in occurrence, certain and universal in character, of long duration and occurring under substantially similar conditions (Point II, supra). In connection with the contract ambiguity, the court below also disregarded the elementary rule of law that an ambiguity should generally be resolved against the draftsmen.

Noonan v. *Bradley*, 9 Wall. 394;
Blair v. *United States*, 99 C. Cls. 71.

As recently held by the Court of Claims in the case of *Peter Kiewit Sons' Company, et al.* v. *United States*, 109 C. Cls. 390, 418:

> "This rule is especially applicable to Government contracts where the contractor has nothing to say as to its provisions."

The decision below is also in conflict with the rulings of this court and of state courts that time is of the essence with respect to delivery provisions of mercantile contracts and that upon nonperformance by either party on the date fixed, the aggrieved party is absolved from completion of the contract (Point III, *supra*). The court below held that respondent could properly demand a subsequent delivery of oil at the contract price after the expiration of the ordering period despite its previous defaults in taking cargo on the several delivery dates through July 20th which it had specified.

The decision of the court below, in holding the plaintiff to be estopped from refusing further deliveries under the contract, is in conflict with the fundamental rule of law that the party seeking to invoke an estoppel must show detriment or damage. (Point III, *supra*).

Conclusion

It is respectfully urged that by reason of the errors hereinabove adverted to, the court erroneously decided this case, and that a correct evaluation of the law and the evidence requires a reversal of the court's determination. It is urged with equal earnestness that the effect and import of the decision arrived at by the court is to condone the defendant's conduct in seeking to apply, as an afterthought and in violation of the true intention of the parties, a subtle twist of language to inflict loss and legal wrong upon this plaintiff, and to violate the tenet of business morality which is given expression in the case of *U. S.* v. *Purcell Envelope Co.*, 249 U. S. 313, 318:

> "And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own."

Ironically, the defendant's "shrewd" argument is being urged against a plaintiff which did not trade sharply with the defendant, but which, in fact, is shown by the record to have been ready to supply at the contract price, in early July, oil which had already advanced substantially in market price.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the court below.

Respectfully submitted,

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